

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 1968 of 1995

For Approval and Signature:

Hon'ble MR.JUSTICE M.H.KADRI

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

BANK OF INDIA

Versus

HASAN HAJI LATIF SAP

Appearance:

MR JT TRIVEDI for Petitioner

MR PB MAJMUDAR for Respondent No. 1

CORAM : MR.JUSTICE M.H.KADRI

Date of decision: 07/11/96

ORAL JUDGEMENT

By way of filing this Civil Revision Application under S.115 of the Code of Civil Procedure, the petitioner Bank of India, Mandvi Branch, Kutch has challenged the order dated 11.8.1995 passed by the learned Civil Judge (SD), Bhuj, below Ex.1 in Civil Misc. Application No. 24 of 1995, whereby the learned Judge rescinded the order of attachment passed in Special Darkhast No. 24 of 1994 with respect of Boat-Lilavanti

lying at Okha Port, on the following conditions :

- "(1) The applicant - Hasan Haji Latif Sap shall furnish a solvent surety of worth amount Rs.3,00,000/- within period of one month from today. On furnishing surety, he will be entitled for the possession of the boat - Lilavanti.
- (2) He is hereby ordered and directed to insure the boat-Lilavanti as per the insurance rules and a xerox copy of the insurance policy shall be submitted in this proceeding.
- (3) This order is subject to the final order which may be passed in Special Execution No. 24 of 1994."

2. The petitioner had filed Special Civil Suit No. 55 of 1985 in the Court of the learned Civil Judge (SD), Bhuj against respondent no.2 to recover the dues of the bank. A decree came to be passed in the above suit on 17.9.1993 for the sum of Rs.1,80,000/- to be recovered from respondent no.2 who was the original defendant in the suit. Pursuant to the decree passed in Special Civil Suit No. 55 of 1985, the petitioner-bank filed Special Darkhast No. 24 of 1994 in the court of the learned Civil Judge (SD), Bhuj, in the month of October, 1994. In the Darkhast proceedings, fishing trawler of the ownership of the original defendant-judgment debtor came to be attached. Respondent No.1 filed Misc. Civil Application No. 24 of 1995 under Order 21, Rule 58 read with S.151 of the Code for raising the attachment of the fishing trawler. In the application, it was stated that he had purchased the fishing trawler from Respondent no.2 by paying Rs.1,50,000/- on 17.9.1990. The above application was opposed by the petitioner-bank. However, the learned trial Judge by his order dated 11.8.1995 passed an order raising the attachment and handing over the fishing trawler to respondent no.1 on his furnishing security of Rs.3,00,000/-.

3. The learned Counsel for the petitioner-bank has contended that the procedure adopted by the executing court was against the provisions of Or.21 R.58 of the Code. It would be convenient to reproduce Or.21 R.58 of the Code, which is as under :

"Adjudication of claims to, or objections to attachment of, property.

58. (1) Where any claim is preferred to, or any objection is made to the attachment of, any property attached in execution of a decree on the ground that such property is not liable to such attachment, the Court shall proceed to adjudicate upon the claim or objection in accordance with the provisions herein contained ;

Provided that no such claim or objection shall be entertained,-

(a) where, before the claim is preferred or objection is made, the property attached has already been sold; or

(b) where the Court considers that the claim or objection was designedly or unnecessarily delayed.

(2) All questions (including questions relating to right, title or interest in the property attached) arising between the parties to a proceeding or their representatives under this rule and relevant to the adjudication of the claim or objection, shall be determined by the Court dealing with the claim or objection and not by a separate suit.

(3) Upon the determination of the questions referred to in sub-rule (2), the court shall, in accordance with such determination,-

(a) allow the claim or objection and release the property from attachment either wholly or to such extent as it thinks fit; or

(b) disallow the claim or objection; or

(c) continue the attachment subject to any mortgage, charge or other interest in favour of any person; or

(d) pass such order as in the circumstances of the case it deems fit.

(4) Where any claim or objection has been adjudicated upon under this rule, the order made thereon shall have the same force and be subject

to the same conditions as to appeal or otherwise as if it were a decree.

(5) Where a claim or an objection is preferred and the Court, under the proviso to sub-rule (1), refuses to entertain it, the party against whom such order is made may institute a suit to establish the right which he claims to the property in dispute; but, subject to the result of such suit, if any, an order so refusing to entertain the claim or objection shall be conclusive."

Admittedly, the fishing trawler was attached under the provisions of Or.38 R.5 of the Code. Besides, the fishing trawler was mortgaged to the petitioner-bank in accordance with the provisions of the Merchants Shipping Act, 1958, and the registration of the mortgage was also made with the Port authorities. Respondent No.1 cannot be said to be bonafide purchaser of the fishing boat without notice as he can be fastened with the knowledge of the mortgage. If Respondent No.1 had purchased the fishing boat, then it was subject to mortgage which is registered, and he can be fastened with the knowledge of the mortgage.

4. The executing court while passing the impugned order has lost sight of the mandatory provisions of 0.21 R.58 sub-rule (2) of the Code which says that all questions arising between the parties to the proceedings or their representatives under the rule and relevant to the adjudication of the claim or objection, shall be determined by the Court dealing with the claim or objection and not by a separate suit. The executing court has entertained the application filed by Respondent No.1 which was filed under the provisions of Or.21 Rule 58 of the Code, and which was in the nature of setting aside the attachment. The executing court ought to have decided the application by giving opportunity to the petitioner-bank and the other parties to lead evidence in support of their say. The executing court has lost sight of sub-rule (2) of Rule 58 of Order 21, and has passed the perfunctory order by rescinding the attachment and handing over the fishing trawler to respondent no.1 on furnishing security of Rs.3,00,000/-. Thus, the executing court has not exercised its jurisdiction so vested in it by the provision of Or.21 Rule 58(2) of the Code. The application of Respondent no.1 should have been tried as a suit, by permitting the petitioner as well as all the parties concerned to lead evidence and thereafter to adjudicate the claim of respondent no.1 who

claims to be the purchaser of the fishing trawler. Therefore, the order of the executing court is liable to be quashed and set aside.

5. As a result of the foregoing discussion, the revision application is allowed. The impugned order dated 11.8.1996 passed by the learned Civil Judge (SD), Bhuj-Kutch below Ex.1 in Civil Misc.Application No.24 of 1995 is quashed and set aside. Civil Misc. Application No. 24 of 1995 is remanded to the executing court with a direction to decide the same afresh keeping in view the provisions of Order 21 Rule 58 of the Code. The executing Court shall also bear in mind that while deciding the application it shall give opportunity to all the concerned parties to lead evidence. The executing court is directed to decide the application being Civil Misc. Application No.24 of 1995 as expeditiously as possible, preferably before 31.1.1997.

Learned Advocates appearing for the petitioner-bank and the original applicant have assured this court that they shall remain present before the executing court on 29.11.1996 without any notice issued by that court, and that they shall extend full co-operation to the executing court for the expeditious disposal of the application.

Rule is made absolute accordingly with no order as to costs. Office is directed to send the writ of this order immediately to the executing court.
